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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATURAL RESOURCES DEFENSE COUNCIL, INC., *ET AL.*,
Petitioners,

v.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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February 8, 1993

QUESTION PRESENTED

May the Defense Nuclear Facilities Safety Board rely on Exemption 3 of the Sunshine Act to deny public access to meetings at which the Board discusses protection of the public's health and safety at defense nuclear facilities, where Congress intended the Board to enhance public access to information regarding safety risks at such facilities, and nothing in the law creating the Board "specifically exempt[s]" such meetings "from disclosure," as required by Exemption 3?

PARTIES TO THE CASE

Petitioners seek review of a decision of the United States Court of Appeals for the District of Columbia Circuit, in which the Court of Appeals denied a petition for review of a regulation issued by the respondent Defense Nuclear Facilities Safety Board (the "Board"). The petitioners here, the Natural Resources Defense Council and the Energy Research Foundation, were the only parties who petitioned for review of the Board's regulation in the Court of Appeals. The Board was the only respondent below and is the sole respondent here. There were no intervenors or *amici* in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals, rejecting petitioners' challenge to the rule under review, is reported at 969 F.2d 1248 and appears in the appendix to this petition ("Pet. App.") at 1a-8a. The dissenting opinion of Judge Stephen Williams appears in the appendix at 9a-14a. Statements by Judges Williams and Patricia Wald accompanying the Court of Appeals' denial of petitioners' suggestion for rehearing *en banc* are reported at 969 F.2d 1255 and appear at 17a-18a.

JURISDICTION

The Court of Appeals denied petitioners' petition for rehearing on October 9, 1992 (Pet. App. at 19a). On December 23, 1992, the Chief Justice entered an order extending the time to

file a petition for a writ of certiorari to February 8, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Exemption 3 of the Sunshine Act, 5 U.S.C. § 552b(c)(3), provides that the Act's open meeting requirements do not apply to portions of meetings which will "disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such manner as to leave no discretion on the issue; or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . .."

Section 2286d(a) of the Defense Nuclear Safety Board Oversight Act of 1987, 42 U.S.C. § 2286d(a), provides, in pertinent part, that "after receipt by the Secretary of Energy of any recommendations from the [Defense Nuclear Facilities Safety] Board . . . the Board promptly shall make such recommendations available to the public in the Department of Energy's regional public reading rooms and shall publish in the Federal Register such recommendations and a request for the submission to the Board of public comments on such recommendations."

STATEMENT OF THE CASE

The issue in this case is whether the Defense Nuclear Facilities Safety Board (the "Board") — which Congress established to better "inform the public" about threats to public health and safety at defense nuclear facilities, S. Rep. No. 232, 100th Cong., 1st Sess. 21 (1987) ("Senate Report") — may deny public access to its meetings under Exemption 3 of the Sunshine Act, 5 U.S.C. § 552b(c)(3). As explained in Judge Williams' dissent, the panel majority took the extraordinary step of transforming

a Congressional "mandate of widespread dissemination" into an Exemption 3 "ban" on public access to Board meetings at which public health and safety risks are discussed. Pet. App. at 12a.

A. Language and History of Exemption 3

The Exemption 3 provision that is currently in both the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(3), and the Sunshine Act has its roots in the original FOIA, which, as enacted in 1966, provided that the public's right of access to records would not apply to materials that were "specifically exempted from disclosure by statute." Pub. L. No. 487, 80 Stat. 251 (1966). Congress amended Exemption 3 in 1976 — at the same time that it enacted the Sunshine Act — for the explicit purpose of overturning a decision by this Court that had construed the exemption too broadly, as incorporating all "laws then extant allowing confidentiality." *Administrator, FAA v. Robertson*, 422 U.S. 255, 266 (1975). In *Robertson*, this Court had allowed the Federal Aviation Administration to withhold information on the basis of a statute that barred release of records "when[,] in [the] judgment" of administrative officials, disclosure would not be "in the interest of the public." 49 U.S.C. § 1504 (1970).

Congress believed that the broad interpretation of Exemption 3 upheld in *Robertson* would give agencies "*cart blanche* to withhold any information [they] please[]." H.R. Rep. No. 880, Pt. I, 94th Cong., 2d Sess. 3 (1976). Therefore, it amended the exemption to provide that material is "specifically exempted from disclosure by statute" only in two express circumstances: if the statute "(A) *requires that the matters be withheld* from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular *criteria for withholding* or refers to particular types of *matters to be withheld*." 5 U.S.C. § 552(b)(3) (FOIA) (emphasis added). Ac-

cordingly, Exemption 3 now applies only to "*explicit* nondisclosure statutes that evidence a Congressional *determination that certain materials ought to be kept in confidence . . . .*" *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979) (emphasis added).

B. The Statute Creating the Safety Board

The Department of Energy ("DOE") is, among other functions, "responsible for producing critical nuclear materials for national security purposes . . . ." Senate Report at 3. Over the past decade, DOE has operated 17 major nuclear weapons research and production facilities in 13 states. In recent years, public and Congressional scrutiny has focused on environmental, safety, and health problems plaguing many of the nation's nuclear weapons production facilities. *See, e.g.*, Senate Report at 42 (the "health, safety, and environmental problems at these facilities are reaching critical proportions and . . . *the DOE complex is putting Americans in increasing risk of being poisoned or irradiated*") (emphasis added).

As one means of dealing with this problem, Congress created the Board and assigned it a number of functions and powers. The Board is required to "investigate any event or practice at a . . . defense nuclear facility which the Board determines has adversely affected, or may adversely affect, public health and safety." 42 U.S.C. § 2286a(2)(A). In addition, the Board is authorized to "make such recommendations to the Secretary of Energy with respect to [DOE] defense nuclear facilities as the Board determines are necessary to ensure adequate . . . protection of public health and safety." 42 U.S.C. § 2286a(5).

To ensure that the public has input to Board determinations bearing on the public's health and safety, Congress imposed a series of notice-and-comment obligations on both the Board and the Secretary. Thus, "after receipt by the Secretary . . . of

any recommendations from the Board," the Board must "promptly" publish such recommendations in the Federal Register, along with a "request for the submission to the Board of public comments . . .." 42 U.S.C. § 2286d(a). The Board's recommendations must also be made "available to the public in the Department of Energy's regional public reading rooms . . .." *Id.* The Secretary must "transmit to the Board, in writing, a statement of whether the Secretary accepts or rejects, in whole or in part, the recommendation submitted to him by the Board," *id.* at § 2286d(b)(1), and the Secretary's response must also be published in the Federal Register, "together with a request for public comment" for submission to the Board. *Id.* at § 2286d(b)(3).[1]

Congress specifically provided that the statute's disclosure requirements "shall not apply in the case of information that is classified," and "shall be subject to [] orders and regulations issued by the Secretary of Energy" under sections 2167 and 2168 of the Atomic Energy Act. *Id.* at § 2286d(h). Those provisions, in turn, authorize the Secretary of Energy and the Nuclear Regulatory Commission to prohibit the disclosure of certain types of information — principally nuclear safeguards data — but only "if the unauthorized disclosure of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security." 42 U.S.C. § 2167(a); *see also* 42 U.S.C. § 2168(a)(2).

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[1]If the Secretary rejects any recommendation made by the Board, the Board may reaffirm its original recommendation or make a revised recommendation, 42 U.S.C. §2286d(d), and the Secretary must then make the "final decision." *Id.* In the rare case of recommendations regarding "an imminent or severe threat to public health and safety," which must be sent to the President, Congress required that "the Board promptly shall make such recommendations available to the public." *Id.* at § 2286d(g)(3).

C. Prior Proceedings

Even though Congress created the Board, in large measure, to better inform the public about health and safety conditions at defense nuclear facilities, the Board first took the anomalous position that it was not an "agency" subject to the open government laws at all. Thus, the Board maintained that it was not obligated to comply in any fashion with either the FOIA or the Sunshine Act, which provides, with certain specified exceptions, that "every portion of every meeting of an agency shall be open to public observation." *See* 5 U.S.C. §§ 552b(b), (c).

In a unanimous opinion (Judges Raymond Randolph, James Buckley, and Douglas Ginsburg), the Court of Appeals rejected the Board's position. "[P]erceiving no reason why Congress would have wanted to shield the Board from the operation of FOIA and of the Sunshine Act," the Court held that the "Board must be considered an 'agency' within the meaning of both statutes." *Energy Research Foundation v. Defense Nuclear Facilities Safety Board,* 917 F.2d 581, 585 (D.C. Cir. 1990). The Court thereby required the Board to promulgate regulations implementing the Sunshine Act. *See* 5 U.S.C. § 552b(g) (requiring all agencies "subject to the requirements" of the Sunshine Act to "promulgate regulations to implement the requirements of subsections (b) through (f) of this section").

In response, the Board promulgated Sunshine Act rules that exempt its most important activities from public scrutiny — precisely the result that the Board had sought by claiming that it was not an "agency." Thus, invoking Exemption 3, the Board declared that it would close all "meetings, or portions of meetings, ***involving deliberations regarding recommendations***" which have not been "received by the Secretary of Energy or the President, respectively . . . ." 56 Fed. Reg. 9609 (1991) (emphasis added). In the preamble to the rule, the Board confirmed that it intended to foreclose public access to any and all

meetings involving the "disposition of, and *information related to,* Board recommendations," regardless of whether such meetings would reveal any of the two kinds of information that Congress expressly instructed the Board to withhold, *i.e.*, classified information and protected nuclear safeguards data. *See* 56 Fed. Reg. 9605 (emphasis added).

The only statutory provision cited by the Board in support of its rule was section 2286d of the Safety Board Act, which, as explained earlier, *see supra* at 5, simply imposes affirmative notice-and-comment requirements on the Board and the Secretary, once the Board has issued a formal recommendation. The Board, however, read those requirements as *forbidding* it from affording public access to its meetings, asserting that Congress had "specified how the information was to be made public—through public notice in the Federal Register, not open public meetings." 56 Fed. Reg. 9606.

When the regulation was challenged by petitioners, the Court ruled that it would "not defer to the Board's construction of sections 2286d(a) and g(3) of the Safety Board Act in determining whether they meet the criteria of Exemption 3 . . .." Pet. App. at 5a. Nevertheless, the panel majority (Buckley, D. Ginsburg) sustained the regulation, "find[ing] the Board's construction of the sections to be the natural one." Pet. App. at 6a. Hence, the majority held that the statutory requirement that the Board "make its 'recommendations available to the public in the Department of Energy's regional public reading rooms' promptly '*after* receipt by the Secretary'" should be read as "requir[ing] the withholding of the recommendations" — and all discussions and information relating to them — "until after they have been received by the Secretary . . .." Pet. App. at 6a (emphasis in original), *quoting* 42 U.S.C. § 2286d(a). Thus, without ever even indicating which subsection of Exemption 3 it was relying on, the Court found that the Safety Board Act's

affirmative disclosure requirements somehow imply a Congressional determination to "*preclud[e]* the *public* disclosure" of all meetings at which the Board considers whether there is a sufficiently grave risk to public health and safety to issue a formal recommendation to the Secretary. Pet. App. at 8a (first emphasis added; second emphasis in original).

In dissent, Judge Williams observed that, "[q]uite apart from a general presumption in favor of disclosure" under the open government laws, "exemption 3 in particular is to be narrowly construed" because of Congress's decision to "specifically overrule[] *Robertson* and amend[] exemption 3 to narrow the category of exempting statutes." Pet. App. at 9a. Judge Williams explained that the majority had simply ignored this Congressional intent, as well as the plain language of Exemption 3, by reading a seemingly straightforward disclosure requirement as a broad *prohibition* on public access:

> Section 2286d(a) is not addressed to meetings at all; its focus is documents — recommendations to the Secretary of Energy and the President. More important, it does not merely specify the sort of accessibility that the FOIA process creates by requiring agencies to respond to *requests* for documents. Instead it *directs affirmative agency steps* —placement in the Department of Energy's public reading rooms, and publication in the Federal Register of the recommendations and a request for comments. *A mandate of widespread dissemination seems an unlikely way of expressing a ban on any prior disclosure.*

Pet. App. at 12a (emphasis added). Moreover, the legislative history — which the majority failed to even mention — confirms that the "Board was created in response to environmental, safety and health problems identified at several of the Department of Energy's nuclear facilities," and thus Con-

gress's overriding objective was to *increase* public access and accountability, not restrict it. *Id.* at 11a, *citing* Senate Report at 21.

Judge Williams further explained that this Court has refused "to find negative implications in mandates of disclosure, even very specific ones." Pet. App. at 12a. He relied for this proposition on *Department of Justice v. Julian*, 486 U.S. 1 (1988), in which the Court rejected the Justice Department's argument that, because Congress had enacted statutes requiring the government to disclose presentence reports to federal prisoners at particular times, it intended that the reports be withheld under Exemption 3 of the FOIA at all other times.

Finally, Judge Williams pointed out that, where Congress truly wanted specific information relating to defense nuclear facilities to be covered by Exemption 3, it was crystal-clear in saying so. Thus, sections 147 and 148 of the Atomic Energy Act "*explicitly* cross-reference exemption 3," Pet. App. at 13a (emphasis added), and thus reflect a "'basic policy decision by the Legislative . . . branch'" to foreclose public access to only a narrow, carefully-defined category of nuclear-related information. *Id.* at 2, *quoting American Jewish Congress v. Kreps*, 574 F. 2d 624, 628 (D.C. Cir. 1978); *see also Energy Research Foundation, supra*, 917 F.2d at 583 (relying on the fact that 42 U.S.C. § 2168 specifically refers to Exemption 3).

The Court of Appeals denied both petitioners' petition for rehearing and suggestion for rehearing *en banc*, although Judge Williams and Judge Wald wrote separate statements further criticizing the panel ruling. Judge Williams stated that he "continue[d] to believe the panel decision is quite wrong," but that he had "not called for a vote on rehearing *en banc*" because the panel opinion "claims adherence" to *Julian* and "does not suggest that later cases have undermined *Julian*." Pet.

App. at 17a (emphasis added). Judge Wald "agree[d] with Judge Williams on the merits of the issue," but did "not call for an *en banc* rehearing" because she "believe[d] it would be futile to do so." *Id.* at 18a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONSTITUTES AN UNPRECEDENTED EXPANSION OF EXEMPTION 3, AND UNDERMINES CONGRESS'S REASON FOR OVERRULING THIS COURT'S DECISION IN *ADMINISTRATOR, FAA V. ROBERTSON.*

By "transform[ing] a mandate for publication into one for concealment," Pet. App. at 11a (Williams, dissenting), the Court of Appeals has turned the law of Exemption 3 upside down and has completely disregarded Congress's patent purpose in overruling *Robertson* in 1976. As noted above, Congress amended Exemption 3 to provide that even statutes which explicitly authorize *withholding* of information do not qualify for Exemption 3 coverage where the statutes vest excessive discretion in the agency. *See supra* at 3. Under the decision below, however, statutes that contain specific *disclosure* requirements that go beyond those of the open government laws — by, for example, requiring dissemination of particular materials in the Federal Register and in public reading rooms — must now be read as sweeping Exemption 3 *prohibitions* on all other kinds of disclosure. This ruling flies in the face of Congress's intent in narrowing the scope of Exemption 3, and has immense implications for the public's rights of access under both the Sunshine Act and the Freedom of Information Act.

Indeed, under the D.C. Circuit's decision, virtually *every* law in which Congress has ordered the Executive Branch to

disclose specific information in some fashion may now be construed, by "negative inference," Pet. App. at 12a, as a legislative *limitation* on disclosure mandated by the open government laws. Thus, for example, the statute establishing the National Transportation Safety Board ("NTSB") — which apparently served as a model for the law at issue here — provides that, "*[w]henever* the Board submits a recommendation regarding transportation safety to the Secretary [of Transportation], he shall respond to each such recommendation formally," and the NTSB "*shall make copies of each such recommendation and response thereto available to the public . . ..*" 49 U.S.C. § 1903(a) (emphasis added).

The NTSB has never maintained that this disclosure mandate constitutes an Exemption 3 statute, and, in fact, it has routinely allowed for public access to meetings at which prospective recommendations to the Secretary of Transportation and other federal officials are considered.[2] Under the panel decision, however, there is no apparent reason why the NTSB

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[2]*See, e.g.*, Federal Register notices of the following NTSB meetings, all of which involved the results of specific safety investigations and/or recommendations to the Department of Transportation, and which were open to the public: 55 Fed. Reg. 53099 (Dec. 26, 1990) ("*Recommendations to FAA:* APU Start Envelope Charts in DC-9 Flight Manuals"); 55 Fed. Reg. 50929 (Dec. 11, 1990); 55 Fed. Reg. 47830 (Nov. 15, 1990); 55 Fed Reg. 45719 (Oct. 30, 1990); 55 Fed. Reg. 42147 (Oct. 17, 1990) ("*Recommendations to FAA and NASA:* Incidents of NASA Airplanes . . . Conflicting With Other Aircraft"); 55 Fed. Reg. 40259 (Oct. 2, 1990) ("Safety Recommendations"); 55 Fed. Reg. 36386 (Sept. 5, 1990); 55 Fed. Reg. 34116 (August 21, 1990) (discussing "*Recommendations:* 'Ten Most Wanted' List"); 55 Fed. Reg. 30366 (July 25, 1990); 55 Fed. Reg. 28343 (July 10, 1990); 55 Fed. Reg. 26055 (June 26, 1990); 55 Fed. Reg. 24025 (June 13, 1990) ("*Recommendations: 'Ten Most Wanted' List*"); 55 Fed. Reg. 22139 (May 31, 1990); 55 Fed. Reg. 20389 (May 16, 1990) ("*Recommendations to FAA:* Require the Use of Approved Restraint Devices for Infants and Small Children"); 55 Fed. Reg. 14377 (April 17, 1990); 55 Fed. Reg. 10573 (March 21, 1990); 55 Fed. Reg. 2480 (Jan. 24, 1990); 55 Fed. Reg. 694 (Jan. 8, 1990).

may not immediately cut off access to all of its meetings under Exemption 3. Plainly, the D.C. Circuit's novel approach to Exemption 3 carries with it extraordinary — and ominous — implications for longstanding rights of public access.

II. THE DECISION BELOW FLATLY CONFLICTS WITH THIS COURT'S RULING IN *DEPARTMENT OF JUSTICE V. JULIAN.*

As Judge Williams demonstrated, Pet. App. at 12a-13a, the Court of Appeals majority did not and could not articulate any coherent distinction between this case and *Julian*. In fact, if there is any meaningful difference between the cases, it is that the disclosure statutes at issue in *Julian* — Rule 32(c) of the Fed. R. Crim. P. and section 4208 of the Parole Act — could far more easily be read as implying a restriction on access than the statutory provision at issue here.

Rule 32(c) not only "specifies the procedure by which the court is to disclose the [presentence] report and its contents to a defendant," but even goes so far as to say that "'[a]ny copies of the presentence investigatory report . . . *shall be returned to the probation officer immediately following the imposition of sentence . . . unless the court, in its discretion otherwise directs.*'" 486 U.S. at 4-5 (emphasis added), *quoting* Fed. R. Crim. P. 32(c). In an opinion authored by Chief Justice Rehnquist, the Court ruled that, although this provision

> does qualify somewhat the defendant's access to his or her presentence report when the report is furnished by the district court in the context of sentencing . . . *it does not convert the Rule, a part of which is essentially designed to mandate disclosure, into a statute that 'specifically exempt[s] from disclosure' for purposes of Exemption 3 of the FOIA.*

486 U.S. at 10 (emphasis added), *quoting* 5 U.S.C. § 552(b)(3).

The Court further stated that, "[e]ven if we assume, as the Government suggests, that the Parole Act [also] implicitly adopts the restriction contained in Rule 32(c)(3)(E), *this would still not convert § 4208 into an Exemption 3 statute.*" 486 U.S. at 11 (emphasis added). If two statutes that "restrict" and "qualify" access to the *precise* record sought under the FOIA are not adequate to sustain an Exemption 3 claim, then it is impossible to comprehend how the Court of Appeals could, consistent with *Julian*, conclude that a straightforward requirement for publication of Board recommendations constitutes a sweeping Exemption 3 prohibition on public access to Board meetings.

The Court of Appeals purported to distinguish *Julian* on the ground that neither the Parole Act nor Rule 32 contains any language "expressly denying defendants and inmates access to their reports" at times other than those specified in the statutes. Pet. App. at 7a. But, as Judge Williams emphasized, "[t]his is not a distinction but a similarity," since "[n]either subsection 2286d(a) nor subsection 2286d(g)(3) [of the Safety Board Act] contains language expressly denying the public access to the Board's meetings." Pet. App. at 13a.

Likewise, the Court of Appeals majority ignored the fact that, as with the statutes at issue in *Julian*, Congress was extremely clear in specifying the information that it wanted to keep secret. Thus, in the Parole Act and Rule 32, Congress delineated those particular portions of presentence reports that it did not want disclosed, *i.e.*, "confidential sources, diagnostic opinions, and other information that may cause harm to the defendant and third parties." *Julian*, 486 U.S. at 9. Similarly, in the Safety Board Act, Congress prescribed the two narrow categories of information relating to defense nuclear facilities which it wanted to keep confidential:

(1) classified information and (2) unclassified safeguards information that is non-disclosable pursuant to regulations issued by the Secretary of Energy and Nuclear Regulatory Commission. 42 U.S.C. § 2286d(h). As Judge Williams noted, petitioners have always recognized that such sensitive information may legitimately be withheld under Exemption 3, and thus "[t]here is neither need nor right [for the Board] to close off every discussion of prospective recommendations." *See* Pet. App. at 13a, 14a.

Indeed, in establishing two narrow grounds for withholding, Congress made it plain beyond any doubt that these grounds may not be used by the Board as an excuse for withholding other information bearing on public health threats at defense nuclear facilities. Thus, the Conference Report declares that section 2286d(h)

> protects classified and controlled information. *This provision does not restrict from public availability information which is not subject to the restrictions on classified and controlled information.*

H. Conf. Rep. No. 989, 100th Cong., 2d Sess. 491 (1988) (emphasis added). In both this case and *Julian*, therefore, Congress signaled in unmistakable terms its "appreciation of the dangers inherent in airing particular data and incorporate[d] a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw." *American Jewish Congress*, 574 F.2d at 628-29.

In short, there is simply no intelligible way to distinguish this case from *Julian*. Accordingly, it is evident that the D.C. Circuit has, in fact, circumvented that controlling precedent and has also disregarded this Court's general admonition that the "FOIA exemptions are to be narrowly construed."

Julian, 486 U.S. at 8 (citations omitted); *accord Department of Air Force v. Rose*, 425 U.S. 352, 360-62 (1976). Instead, the Court of Appeals fashioned a new and far more expansive standard for Exemption 3 coverage, under which, as characterized by Judge Williams, a " 'require[ment]' of non-disclosure" may now be discerned by the government or a reviewing court "simply by application of the *expressio unius* maxim to a mandate of disclosure." Pet. App. at 17a. This new test will have a devastating impact on the public's rights under the open government laws, as illustrated by the adverse effect it is already having on the public's ability to learn about threats to public health and safety at the nation's defense nuclear facilities. We now turn to that matter.

III. IN CLEAR CONTRAVENTION OF CONGRESS'S INTENT, THE RULING BELOW WILL PRECLUDE PETITIONERS AND OTHER MEMBERS OF THE PUBLIC FROM LEARNING ABOUT RISKS TO PUBLIC HEALTH AND SAFETY AT THE NATION'S DEFENSE NUCLEAR FACILITIES.

Contrary to Congress's intent that the public receive *more* information about unsafe conditions at defense nuclear facilities, *see* Senate Report at 21, the ruling below means that the public will now be shut out of *all* meetings at which the Board considers vital health and safety recommendations for the Secretary of Energy — the Board's central mission. Even worse, because the Court of Appeals ruling was based on Exemption 3, the Court necessarily found that Congress "*preclud[ed] . . . public* disclosure," Pet. App. at 8a (emphasis added), and hence the Court, in effect, created a *permanent* restriction on the authority of all future Boards to hold open meetings. *Id.; see also American Jewish Congress v. Kreps, supra*, 574 F.2d at 628 (Exemption 3 statutes "incorporate a congressional *mandate* of confiden-

tiality") (emphasis added). In essence, the D.C. Circuit has effectively tied the hands of all future Boards, including those that may perceive greater public access as critical to carrying out their statutory mission.[3]

Thus, as a result of the ruling below, it appears that the Board is now ***required*** to deny public access to a host of meetings that concern threats to the public health and safety, and which do not involve even a moment's discussion of classified information. For instance, the Board must now deny public access to meetings at which it considers whether a formal recommendation should issue as a result of a grave health and safety problem at a particular defense nuclear facility — thus precluding public scrutiny of discussions and information going to the very heart of the Board's statutory mission. Moreover, under the regulation sustained by the Court, if the Board decides not to publish a recommendation, the public may ***never*** learn that there was a health and safety problem that was sufficiently serious to prompt the Board to consider issuing a recommendation. It is impossible to reconcile this result with Congress's emphatic intent to curb the "secrecy surrounding the nuclear weapons complex," and to better "inform the public" about health and safety problems at defense nuclear facilities. Senate Report at 21, 23, 42.

Furthermore, when the Board does issue a recommendation, public access to pertinent meetings and documents is crucial to the public's ability to "meaningfully contribut[e] to the process of formulating and implementing recommendations . . .." 56 Fed.

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[3]This harsh result may explain why the United States Deaprtment of Justice, which represented the Board in the predecessor case involving the Board's status as an agency subject to the open government laws, *see Energy Research Foundation, supra,* took the highly unusual step of not entering an appearance, or taking any position, on behalf of the Board in this case.

Reg. 9606. As noted earlier, under section 2286d of the Act, the Board is only required to publish in the Federal Register the recommendations themselves; it is not obligated to, and as a matter practice does not, include in its Federal Register notice any of the health and safety data, or the reasoning process, that forms the foundation of its conclusion.

For example, the Board published crucial findings regarding conditions that should be met prior to restart of the Savannah River reactors — a matter in which petitioners, and particularly the South Carolina-based Energy Research Foundation, have a vital interest. *See* 55 Fed. Reg. 7022 (1990). The Board did not, however, include in its cursory Federal Register notice the data which led to its conclusions, or, for that matter, *any* explanation of how or why it determined, for instance, that "standards for training of reactor plant operators and supervisors at Savannah River have not been adequately determined and specified." *Id.* Consequently, the only way in which members of the public could submit informed "comments, data, views, or arguments to the Board concerning the recommendations," as Congress contemplated, *see* 42 U.S.C. § 2286d(a), would be by gaining access to the meetings leading up to the issuance of these recommendations — public access which is now foreclosed by the Court of Appeals' ruling.

At bottom, the ruling below not only eviscerates the public's rights under the Sunshine Act and FOIA, but it also greatly frustrates the detailed statutory scheme crafted by Congress for increasing long-overdue and desperately-needed public access to, and input into, government decisions bearing on health and safety risks at defense nuclear facilities.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 8, 1993

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 14, 1991 Decided July 24, 1992

No. 91-1199

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND ENERGY RESEARCH FOUNDATION, PETITIONERS

v.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD, RESPONDENT

Petition for Review of an Order of the Defense Nuclear Facilities Safety Board

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Eric R. Glitzenstein, with whom *Katherine A. Meyer* and *Dan W. Reicher* were on the brief, for petitioners.

Robert M. Anderson, General Counsel, Defense Nuclear Facilities Safety Board, with whom *Richard A. Azzaro,* Associate General Counsel, was on the brief, for respondent.

Before BUCKLEY, WILLIAMS, and D. H. GINSBURG, *Circuit Judges.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Dissenting opinion filed by *Circuit Judge* WILLIAMS.

BUCKLEY, *Circuit Judge*: Respondent Defense Nuclear Facilities Safety Board issued regulations, as required by the Government in the Sunshine Act, setting forth the circumstances under which it will deny public access to its meetings. The regulations provide, *inter alia,* that the Board may close meetings, or portions of meetings, involving deliberations on Board recommendations relating to the public health and safety. Petitioners, Natural Resources Defense Council and Energy Research Foundation, are environmental organizations that challenge the Board's regulation as contrary to the requirements of the Sunshine Act. Because we find that the Board properly invoked Exemption 3 of the Act, we uphold the regulation.

I. BACKGROUND

A. Statutory Framework

The Government in the Sunshine Act, 5 U.S.C. § 552b (1988), provides that agency meetings will be open to public observation unless the material to be discussed at the meeting qualifies under one or more of ten exemptions defined in subsection 552b(c). Exemption 3 allows an agency to close portions of a meeting likely to

> disclose matters specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Id. § 552b(c)(3).

The Board operates pursuant to its enabling statute, the Defense Nuclear Facilities Safety Board Act. *See* 42 U.S.C. § 2286-2286i (1988). The Safety Board Act requires the Board to review, investigate, and evaluate the standards, operations, design, and construction of Department

of Energy ("DOE") defense nuclear facilities, *see id.* § 2286a(1)-(4), and to make recommendations to the Secretary of Energy when such recommendations "are necessary to ensure adequate protection of public health and safety," *id.* § 2286a(5). Section 2286d(a) provides for the "[p]ublic availability" of the Board's recommendations:

> Subject to subsections (g) and (h) of this section and *after* receipt by the Secretary of Energy of any recommendations from the Board under section 2286a of this title, the Board promptly shall make such recommendations available to the public in the Department of Energy's regional public reading rooms and shall publish in the Federal Register such recommendations.

Id. § 2286d(a) (emphasis added).

The Safety Board Act adjusts this scheme when the Board determines that a recommendation "relates to an imminent or severe threat to public health and safety." *Id.* § 2286d(g)(1). In such cases, the Board is required to transmit its recommendation not only to the Secretary of Energy, but also to the President. *Id.* at § 2286d(g)(2). Then, "[a]fter receipt by the President of the recommendation . . ., the Board promptly shall make such recommendation available to the public." *Id.* § 2286d(g)(3).

B. Previous Related Case and the Board's Response

In *Energy Research Foundation v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990), we rejected the Board's assertion that it was not an "agency" within the scope of the Sunshine Act and the Freedom of Information Act ("FOIA"). We therefore held that the Sunshine Act and FOIA applied, although we "express[ed] no opinion on the subject" of whether "exceptions to [the Sunshine Act and FOIA] would enable [the Board] to close its meetings and withhold its records." *Id.* at 582. After this decision, the Board promulgated "Rules Implementing the Government In the Sunshine Act." *See* 56 Fed. Reg. 9605-11 (1991) (codified at 10 C.F.R. § 1704 (1992)). Section 1704.4 of these rules provides that

> a meeting may be closed and information pertinent to such meeting ... may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:
>
> . . . .
>
> (c) Disclose matters specifically exempted from disclosure by statute . . . *Provided,* That such statute:
>
> (1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> *This exemption applies to Board meetings, or portions of meetings, involving deliberations regarding recommendations which, under 42 U.S.C. 2286d (a) and (g)(3), may not be made publicly available until after they have been received by the Secretary of Energy or the President, respectively.*

10 C.F.R. § 1704.4 (second emphasis added).

Petitioners challenge the regulation, arguing that sections 2286d(a) and g(3) of the Safety Board Act do not require the Board to withhold recommendations from the public. The Board insists, however, that the sections require, in unambiguous terms, that they not be released to the public until after they have been received by either the Secretary or the President. The Board also maintains that allowing the public to attend meetings at which recommendations are considered would frustrate free and open debate of highly sensitive issues affecting national security and public health and safety.

II. Discussion

A. Standard of Review

Unless Congress's intent is "unambiguously expressed," we will generally defer to an agency's interpretation of its

enabling statute so long as the interpretation is "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted). *Chevron* deference may be trumped, however, when the enabling statute must be read with other statutes, such as FOIA and the Sunshine Act, that impose general obligations on all government agencies. As we found in applying FOIA's nearly identical Exemption 3,

> since the statute's purpose—disclosure of certain information held by the government—creates tension with the understandable reluctance of government agencies to part with that information, Congress intended that the primary interpretive responsibilities rest on the judiciary, whose institutional interests are not in conflict with that statutory purpose.

Reporters Comm. for Freedom of the Press v. Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989). In that case, we concluded that

> a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose to exempt matters from disclosure in the actual words of the statute ... [not] in an agency's interpretation of the statute.

Id. at 735 (footnote omitted). Therefore, we will not defer to the Board's construction of sections 2286d(a) and g(3) of the Safety Board Act in determining whether they meet the criteria of Exemption 3 of the Sunshine Act.

B. Exemption 3

To invoke Exemption 3, an agency must demonstrate (1) that a statute exists that either requires that matters be withheld from the public "in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld," 5 U.S.C. § 552b(c)(3); and (2) that the portion of the meeting to be closed is likely to disclose material protected by statute, *id.* at § 552b(c).

In this case, petitioners argue that sections 2286d(a) and (g)(3) do not require Board recommendations to be withheld from the public in terms that satisfy Exemption 3. In their view, "after" does not mean "only after"; therefore, these sections fall short of the requirement that they oblige the agency to withhold the recommendations. Petitioners thus claim that the Sunshine Act operates to allow public access to the Board meetings at which recommendations are formulated and adopted.

We disagree. We find the Board's construction of the sections to be the natural one. Moreover, when read in context, "after" means "only after." Section 2286d(a), which was enacted after the Sunshine Act, requires that the Board make its "recommendations available to the public in the Department of Energy's regional public reading rooms" promptly "*after* receipt by the Secretary." 42 U.S.C. § 2286d(a) (emphasis added). This careful mechanism for the time-controlled disclosure of the recommendations would be unnecessary if they were generally available to the public at an earlier stage through the Sunshine Act. We therefore conclude that the most obvious reading of sections 2286d(a) and (g)(3) is also the correct one. Because they require the withholding of the recommendations until after they have been received by the Secretary or the President, the sections fall within Exemption 3.

Petitioners nevertheless argue that the Board's regulation is inconsistent with *United States Dep't of Justice v. Julian,* 486 U.S. 1 (1988). There, two inmates had sued the Parole Commission under FOIA for disclosure of their presentence investigation reports. The Parole Commission claimed that the reports were exempt from disclosure under FOIA's Exemptions 3 and 5.

In arguing its Exemption 3 claim, the Parole Commission relied on two statutes that arguably provided for the time-controlled, limited disclosure of presentence reports. At that time, Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure provided that "[a]t a reasonable time

before imposing sentence the court shall permit the defendant and his counsel to read the [presentence] report." Rule 32(c)(3)(E) further provided that any copy of the presentence report furnished to a defendant "shall be returned to the probation officer immediately following the imposition of sentence." After sentencing, a copy of the presentence report was typically transmitted to the Bureau of Prisons, where it could be used to determine the inmate's classification and privileges. The Parole Act required the Parole Commission to provide a prisoner, at least thirty days before a scheduled parole hearing, with "reasonable access to [the presentence] report . . . used by the Commission in making" its parole determination. 18 U.S.C. § 4208(b) (1982).

The Parole Commission argued that these statutes demonstrated that although Congress intended defendants/inmates to have some access to their presentence reports, it also sought to limit that access to the times specifically provided in Rule 32(c) and the Parole Act. *See Julian,* 486 U.S. at 10-11. The Supreme Court found, however, that

> neither the Rule nor the Act satisfies the requirements of Exemption 3. Both provisions have been recently changed, not to protect the presentence report from disclosure, but to ensure that it would be disclosed to the defendant who is about to be sentenced or who is up for parole.

Id. at 9. The Court refused to "convert the Rule, a part of which is essentially designed to mandate disclosure, into a statute that 'specifically exempt[s] from disclosure' for purposes of Exemption 3 of the FOIA." *Id.* at 10.

Julian is readily distinguished. The Rule and the Parole Act require sentencing courts and parole boards to provide defendants and inmates with their presentence reports no later than the times specified; they contain no language expressly denying defendants and inmates access to their reports at other times. Furthermore, the disclosure authorized by the Supreme Court in *Julian* is

to the inmates who are the subjects of the presentence reports, not to the public at large. The Court noted that Rule 32(c) required that reports furnished defendants pursuant to the Rule be returned to the sentencing courts in order "to ensure that [the reports] do not become available to unauthorized persons," *Julian,* 486 U.S. at 10, but observed that the Parole Act only required that "reasonable access" be given to a presentence report, and that "there is no express limitation on an inmates power to retain a copy of the report." *Id.* at 11. The Court's restriction of the FOIA disclosure to the requesting inmates was noted by Justice Scalia in his dissent. *See id.* at 15 (Scalia, J., dissenting) ("today's decision . . . makes a departure . . . from the general principle of the Freedom of Information Act that individuating characteristics of requestors are not to be considered"). Here, the statutory language requires that the information be made available to the public *after* a specific event, thereby precluding the *public* disclosure of recommendations dealing with highly sensitive matters before they reach the person or persons to whom they are directed.

In upholding the challenged regulation, we remind the Board that it may invoke the regulation only with respect to that portion of a meeting during which recommendations that will be sent to the Secretary or the President are likely to be discussed, *see* 5 U.S.C. § 552b(c); and that before it does so, the Board must determine by a majority vote that it will be discussing recommendations. *See id.* § 552b(d)(1). Moreover, after a closed meeting, the Board must provide the public with a transcript, electronic recording, or minutes of all portions of the meeting not devoted to the Board's recommendations. *See id.* § 552b(f)(2).

III. Conclusion

For the foregoing reasons, we deny the petition for review.

So ordered.

WILLIAMS, *Circuit Judge*, dissenting: Exemption 3 of the Sunshine Act piggybacks on other statutes, permitting an agency to close the portions of a meeting that are likely to "disclose matters *specifically exempted* from disclosure by statute". 5 U.S.C. § 552b(c)(3) (1988) (emphasis added). The exempting statute must also satisfy one of exemption 3's two subsections. It will satisfy subsection (A) if it "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue", *id.* § 552b(c)(3)(A); it will satisfy subsection (B) if it "establishes particular criteria for withholding or refers to particular types of matters to be withheld", *id.* § 552b(c)(3)(B). The Board here invoked exemption 3 to justify closing all its meetings concerning recommendations to the Secretary of Energy and the President, pointing to statutes whose only relevant language, far from exempting anything from disclosure, specifically or otherwise, *forces* the Board not merely to disclose information but to broadcast it via the Federal Register. See §§ 315(a) and 315(g) of the Defense Nuclear Facilities Safety Board Act, 42 U.S.C. §§ 2286d(a), (g)(3) (1988). Unable to find any negative implication in this disclosure mandate, I dissent.

Quite apart from a general presumption in favor of disclosure under the Sunshine Act, *Common Cause v. NRC*, 674 F.2d 921, 932 (D.C. Cir. 1982); see also *United States Department of State v. Ray*, 112 S. Ct. 541, 547 (1991) (noting FOIA's "strong presumption in favor of disclosure [that] places the burden on the agency to justify the withholding of any requested [information]"), exemption 3 in particular is to be narrowly construed. In its original form, as an exemption to the Freedom of Information Act, it merely provided that FOIA was inapplicable to matters "specifically exempted from disclosure by statute". 5 U.S.C. § 552(b)(3) (1970). In *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), the Supreme Court held that this language authorized nondisclosure whenever a statute granted an agency discretionary power to decide whether disclosure was in the public interest and the

agency decided not to disclose. Congress thought this reading too broad, however, and, when it enacted the Sunshine Act in 1976, it specifically overruled *Robertson* and amended exemption 3 to narrow the category of exempting statutes. See H.R. Rep. No. 880, 94th Cong., 2d Sess. 9-10, 23, *reprinted in* 1976 U.S.C.C.A.N. 2191, 2204-05; H.R. Conf. Rep. No. 1441, 94th Cong., 2d Sess. 25, *reprinted in* 1976 U.S.C.C.A.N. at 2261; *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1137-38 & n.37 (D.C. Cir. 1987); *Irons & Sears v. Dann*, 606 F.2d 1215, 1219-20 (D.C. Cir. 1979). As amended, exemption 3 (identical for both FOIA and the Sunshine Act) covers only statutes that fit one or the other of its two subsections quoted above. Subsection (A) "embraces only those statutes incorporating a congressional mandate of confidentiality that, however general, is 'absolute and without exception.'" *American Jewish Congress v. Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978) (footnotes and citation omitted). Subsection (B), by contrast, allows room for administrative discretion in two narrowly defined areas, where it is either constrained by "particular criteria" or limited to "a narrowly-defined category of records", *Reporters Committee for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 736-37 n.9 (D.C. Cir.), modified, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989). But subsection (B)'s "unmistakable thrust, like that of Subsection (A), is to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive branch." *American Jewish Congress*, 574 F.2d at 628.

The provisions invoked by the Board, 42 U.S.C. §§ 2286d(a) and (g)(3), do not even mention withholding at all, much less require it (subsection (A) of exemption 3) or specify particular criteria to govern withholding or specific matter that the agency may withhold in its discretion (subsection (B) of exemption 3). Instead, the provisions affirmatively require specific forms of disclosure and publication. Section 2286d(a) says:

> Subject to subsections (g) and (h) of this section and after receipt by the Secretary of Energy of any recom-

> mendations from the Board under section 2286a of this title, the Board promptly shall make such recommendations available to the public in the Department of Energy's regional public reading rooms and shall publish in the Federal Register such recommendations and a request for the submission to the Board of public comments on such recommendations. Interested persons shall have 30 days after the date of the publication of such notice in which to submit comments, data, views, or arguments to the Board concerning the recommendations.

And subsection 2286d(g)(3), which applies to recommendations related to "an imminent or severe threat to public health and safety", provides:

> After receipt by the President of the recommendation from the Board under this subsection, the Board promptly shall make such recommendation available to the public and shall transmit such recommendation to the Committees on Armed Services and on Appropriations of the Senate and to the Speaker of the House of Representatives. The President shall promptly notify such committees and the Speaker of his decision and the reasons for that decision.

The majority reads "after" in both subsections as "only after", Maj. Op. at 6, and transforms a mandate for publication into one for concealment. Of course statutes *may* have negative implications. The legislative history, for example, might clearly indicate that Congress had picked a specific time as the earliest permissible, so that all prior disclosure was forbidden. Not so here. The Board was created in response to environmental, safety and health problems identified at several of the Department of Energy's nuclear facilities. The Senate Committee on Armed Services conducted hearings to investigate the problems and ultimately recommended creating an independent advisory board that would have as its "primary mission to identify the nature and consequences of any significant potential threats to public health and safety, to elevate such issues to the highest levels of authority, and *to inform the public*." S. Rep. No. 232, 100th Cong., 1st Sess.

21 (1987) (emphasis added). There is simply no evidence that Congress thought it was picking the delivery of recommendations to the Secretary as the *first* acceptable moment for disclosure. The Board's argument is really a variation on the maxim *expressio unius est exclusio alterius*, which we have tended to reject in the administrative context, reading omissions as blanks that can be filled in with administrative discretion. See *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 68-69 (D.C. Cir. 1990) (citing cases); cf. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984). Here, of course, after Congress's overturning of *Robertson*, a statute giving the agency discretion is not enough.

The negative inference seems especially weak here. Section 2286d(a) is not addressed to meetings at all; its focus is documents — recommendations to the Secretary of Energy and the President. More important, it does not merely specify the sort of accessibility that the FOIA process creates by requiring agencies to respond to *requests* for documents. Instead it directs affirmative agency steps — placement in the Department of Energy's public reading rooms, and publication in the Federal Register of the recommendations and a request for comments. A mandate of widespread dissemination seems an unlikely way of expressing a ban on any prior disclosure.

The Supreme Court has shown a clear reluctance to find negative implications in mandates of disclosure, even very specific ones. In *Department of Justice v. Julian*, 486 U.S. 1 (1988), the Justice Department argued that because Rule 32 of the Federal Rules of Criminal Procedure and the Parole Act required the government to disclose presentence reports to federal defendants and prisoners at particular times (prior to sentencing and parole determinations), they required withholding under all other circumstances, thereby satisfying exemption 3. The Court refused to find any negative implication. It characterized the Rule and Act as generally aimed at ensuring disclosure, *id.* at 9-10, which is equally true here. Addressing a claim that Rule 32(c)(3)(E)'s require-

ment that presentence reports be returned to the court suggested Congress's intention to specifically exempt the reports from disclosure, it said: "[T]his provision does qualify somewhat the defendant's access to his or her presentence report when that report is furnished by the district court in the context of sentencing, but in our opinion it does not convert the Rule, a part of which is *essentially designed to mandate disclosure*, into a statute that 'specifically exempt[s] from disclosure' for purposes of Exemption 3". *Id.* at 10 (emphasis added).

The majority concedes *Julian*'s basic thrust, see Maj. Op. at 6-7, yet dismisses its relevance on the ground that neither the Rule nor the Parole Act contained any language "expressly denying defendants and inmates access to their reports at other times", *id.* at 7. This is not a distinction but a similarity. Neither subsection 2286d(a) nor subsection 2286d(g)(3) contains language expressly denying the public access to the Board's meetings.

In creating the Board, Congress explicitly considered the problem of information it would be risky to disclose. Subsection 2286d(h) specifically excludes from disclosure both (1) classified information and (2) unclassified information that is non-disclosable pursuant to regulations issued by the Secretary of Energy under §§ 147 and 148 of the Atomic Energy Act, 42 U.S.C. §§ 2167, 2168. Those sections, in turn, authorize the Secretary of Energy and Nuclear Regulatory Commission to promulgate rules prohibiting the disclosure of certain types of information but only "if the unauthorized disclosure of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security". *Id.* § 2167(a); see also *id.* § 2168(a)(2). As the Atomic Energy Act provisions explicitly cross-reference exemption 3, petitioners acknowledge that they protect such information from disclosure. Petitioners' Brief at 18.

Despite these protections, the Board expresses concern that some national security information might be revealed

in a meeting on recommendations. Gov't Brief at 19-20. But the Board can eliminate that risk by closing meetings that are entirely devoted to exempt matters, and any portions of meetings relating to such matters. There is neither need nor right to close off every discussion of prospective recommendations. See *Pan American World Airways, Inc. v. Civil Aeronautics Board*, 684 F.2d 31, 35-37 (D.C. Cir. 1982); *Common Cause v. NRC*, 674 F.2d at 929, 936 n.46; *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259, 1265 (D.C. Cir. 1980) (noting "congressional insistence that meetings may be closed only on an individual and particularized basis").

In essence, the Board and the majority are here extending FOIA exemption 5 to the Sunshine Act. That exemption, 5 U.S.C. § 552(b)(5), protects predecisional deliberative documents, on the sensible ground that the prospect of disclosure would inhibit robust expression by those who participate in developing an agency position. See, e.g., *Access Reports v. Department of Justice*, 926 F.2d 1192, 1194-95 (D.C. Cir. 1991). When Congress was drafting the Sunshine Act, several federal agencies requested a similar exemption for predecisional oral deliberations, but Congress refused. See *Common Cause v. NRC*, 674 F.2d at 929. Neither the Board nor we are free to reverse that judgment.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed October 9, 1992

No. 91-1199

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND ENERGY RESEARCH FOUNDATION,
PETITIONERS

v.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD,
RESPONDENT

On Petitioner's Suggestion for Rehearing *En Banc*

Before: MIKVA, *Chief Judge*; WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON and RANDOLPH, *Circuit Judges*.

ORDER

Petitioner's Suggestion for Rehearing *En Banc* has been circulated to the full Court. No member of the Court

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

A statement of Circuit Judge Williams concurring in the denial of rehearing *en banc* is attached.

A statement of Circuit Judge Wald is also attached.

WILLIAMS, *Circuit Judge*, concurring in the denial of rehearing *en banc*. For the reasons stated in my dissent, I continue to believe the panel decision is quite wrong. But it is hard to classify the dispute as one of "exceptional importance" or where *en banc* treatment is truly "necessary" to maintain uniformity of circuit law. See Rule 35(a), Federal Rules of Appellate Procedure. The opinion claims adherence to *United States Dep't of Justice v. Julian*, 486 U.S. 1 (1988), which appears to preclude finding a "require[ment]" of non-disclosure simply by application of the *expressio unius* maxim to a mandate of disclosure; the panel does not suggest that later cases have undermined *Julian*. Thus the decision is evidently driven by some idiosyncratic feature of 42 U.S.C. § 2286d(a) (1988), admittedly still undetectable by me, rather than by a view that specific mandates of disclosure *generally* support an inference that related disclosures are forbidden. Believing the case will cast no shadow over circuit law on Exemption 3, I have not called for a vote on rehearing *en banc*.

WALD, *Circuit Judge*: I agree with Judge Williams on the merits of the issue. I am less sanguine about its "nonexceptional" nature; I can only hope his prediction of its "shadowless" character proves correct. I do not call for an *en banc* rehearing because I believe it would be futile to do so.

United States Court of Appeals
For The District Of Columbia Circuit
September Term 1992

No. 91-1199

Natural ResourcesDefense Council, Inc.
and Energy Research Foundation,

Petitioners

v.

Defense Nuclear Facilities Safety Board,

Respondent

BEFORE: Buckley, Williams and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing, filed September 4, 1992, it is

ORDERED, by the Court that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: Robert Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Cir cuit
FILED OCT 9 1992
RON GARVIN
CLERK

(2)

Supreme Court, U.S.
FILED
APR 12 1993
OFFICE OF THE CLERK

No. 92-1336

In the Supreme Court of the United States

OCTOBER TERM, 1992

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
PETITIONERS

v.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Exemption 3 of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(3), applies to meetings during which the Defense Nuclear Facilities Safety Board discusses recommendations for the Secretary of Energy or the President regarding the safety of defense nuclear facilities.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1336

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., PETITIONERS

v.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 969 F.2d 1248.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1992. A petition for rehearing was denied on October 9, 1992. Pet. App. 15a-18a. On December 23, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 8, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Government in the Sunshine Act, 5 U.S.C. 552b, generally requires meetings of federal collegial agencies to "be open to public observation." 5 U.S.C. 552b(b). That requirement does not apply, however, to any part of a meeting or information about a meeting that falls within any of ten exemptions. See 5 U.S.C. 552b(c)(1)-(10). The exemption involved in the present case, Exemption 3, removes from the open-meeting requirement any part of a meeting or information about a meeting that is likely to

> disclose matters specifically exempted from disclosure by statute * * *, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. 552b(c)(3).

2. The Defense Nuclear Facilities Safety Board (Board) is an independent establishment in the Executive Branch that was created in 1988 to oversee the safety of "Department of Energy defense nuclear facilities," which are nuclear production, utilization, and waste-storage facilities operated for national security purposes under the jurisdiction of the Department of Energy (DOE). See National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, Tit. XIV, § 1441(a)(1), 102 Stat. 2076 (1988) (codified at 42 U.S.C. 2286-2286i); see also 42 U.S.C. 2286g (defining "Department of Energy defense nuclear facility"). The Board is composed of five members appointed by the President with the advice

and consent of the Senate. 42 U.S.C. 2286(b)(1). The members of the Board must be "respected experts in the field of nuclear safety," and they cannot be associated with DOE. 42 U.S.C. 2286(a), (b)(1) and (3).

The Board has five duties pertaining to DOE defense nuclear facilities under its enabling Act. It evaluates the standards for building, operating, and decommissioning facilities. 42 U.S.C. 2286a(1). It investigates any event at a facility that "has adversely affected, or may adversely affect, public health and safety." 42 U.S.C. 2286a(2). It analyzes safety data on the facilities. 42 U.S.C. 2286a(3). It reviews designs for the construction of new facilities. 42 U.S.C. 2286a(4). Finally, and most importantly for the present case, it makes recommendations to the Secretary of Energy regarding the safety of facilities. In particular, the Board makes recommendations regarding the construction of new facilities. *Ibid.* More broadly, the Board makes "such recommendations to the Secretary of Energy with respect to [DOE] defense nuclear facilities, including operations of such facilities, standards, and research needs, as the Board determines are necessary to ensure adequate protection of public health and safety." 42 U.S.C. 2286a(5).

The disposition of the Board's safety recommendations is the subject of a detailed, separate provision in the Board's enabling Act: 42 U.S.C. 2286d. Section 2286d contemplates that the Board will transmit its recommendations to the Secretary of Energy. Then, under subsection (a) of Section 2286d:

> after receipt by the Secretary of Energy of any recommendations from the Board * * *, the Board

> promptly shall make such recommendations available to the public in the [DOE's] regional public reading rooms and shall publish in the Federal Register such recommendations and a request for the submission to the Board of public comments on such recommendations. Interested persons shall have 30 days after the date of the publication of such notice in which to submit comments, data, views, or arguments to the Board concerning the recommendations.

42 U.S.C. 2286d(a). Under subsection (b) of Section 2286d, the Secretary must respond in writing to the Board's recommendation within 45 days after receiving it. 42 U.S.C. 2286d(b)(1). Also under subsection (b), "[a]t the same time as the Secretary * * * transmits [her] response to the Board," she must "publish such response, together with a request for public comment on [her] response, in the Federal Register." 42 U.S.C. 2286d(b)(2). Interested persons then have 30 days to submit comments to the Board on the Secretary's response. 42 U.S.C. 2286d(b)(3). In addition, "[t]he Board may hold hearings for the purpose of obtaining public comments on its recommendations and the Secretary of Energy's response." 42 U.S.C. 2286d(b)(4).

If the Secretary of Energy rejects the Board's recommendation in whole or in part, the Board may, under subsection (d) of Section 2286d, either reaffirm or revise its recommendation. 42 U.S.C. 2286d(d). In either case, the Secretary must, "[w]ithin 30 days after receiving the notice of the Board's action," reach "a final decision on whether to implement all or part of the Board's recommendations." *Ibid.* The

Secretary is required to publish her final decision in the Federal Register and send it to the Committees on Armed Services and on Appropriations of the Senate and to the Speaker of the House. *Ibid.* She then has 90 days within which to submit to the Board a plan for implementing any recommendations or parts of recommendations that she accepted in her final decision. 42 U.S.C. 2286d(e).

The disposition of a Board recommendation differs somewhat when the recommendation "relates to an imminent or severe threat to public health and safety." 42 U.S.C. 2286d(g)(1). In that case, subsection (g)(2) of Section 2286d provides that "[a]t the same time that the Board transmits [the] recommendation * * * to the Secretary of Energy, the Board shall also transmit the recommendation to the President." 42 U.S.C. 2286d(g)(2). Then, under subsection (g)(3) of Section 2286d:

> [a]fter receipt by the President * * *, the Board promptly shall make such recommendation available to the public and shall transmit such recommendation to the Committees on Armed Services and on Appropriations of the Senate and to the Speaker of the House of Representatives.

42 U.S.C. 2286d(g)(3). The Secretary similarly must submit to the President her response to Board's recommendation. 42 U.S.C. 2286d(g)(2). It is the President, rather than the Secretary, who "make[s] the decision concerning acceptance or rejection of the Board's recommendation." *Ibid.*

3. In *Energy Research Foundation* v. *Defense Nuclear Facilities Safety Board*, 917 F.2d 581 (1990), the D.C. Circuit held that the Board is an "agency"

within the meaning of the Sunshine Act, 5 U.S.C. 552b(a)(1). In response to that holding, the Board promulgated regulations implementing the Sunshine Act. 56 Fed. Reg. 9609 (1991) (codified at 10 C.F.R. 1704.1-1704.10). The Board's regulation implementing Exemption 3 begins by tracking the Sunshine Act:

> [A] meeting may be closed and information pertinent to such meeting * * * may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:
>
> * * * * *
>
> (c) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *Provided*, That such statute:
>
> (1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

10 C.F.R. 1704.4(c). The regulation then states that it "applies to Board meetings, or portions of meetings, involving deliberations regarding recommendations which, under 42 U.S.C. 2286d(a) and (g)(3), may not be made publicly available until after they have been received by the Secretary of Energy or the President, respectively." *Ibid.*

4. a. Petitioners filed a petition for review in the D.C. Circuit challenging the Board's regulation implementing Exemption 3 of the Sunshine Act. See

5 U.S.C. 552b(g) (providing for judicial review of Sunshine Act regulations in D.C. Circuit). Petitioners argued that the Board could not rely upon Exemption 3 to close meetings in which recommendations to the Secretary of Energy or the President were discussed, because, in their view, the provisions of the Board's enabling Act cited in the Board's Exemption 3 regulation—42 U.S.C. 2286d(a) and (g)(3)—do not prohibit disclosure of those recommendations prior to their receipt by the Secretary or the President.

The court of appeals denied the petition for review. Pet. App. 1a-14a.[1] Although the court determined that the Board's interpretation of the Sunshine Act was not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it nonetheless sustained that interpretation as "the correct one." Pet. App. 6a. The court observed that "Section 2286d(a), which was enacted after the Sunshine Act, requires that the Board make its 'recommendations available to the public in the Department of Energy's regional public reading rooms' promptly '*after* receipt by the Secretary.'" *Ibid.* (quoting, with emphasis, 42 U.S.C. 2286d(a)). The court determined that "when read in context, 'after' means 'only after.'" Pet. App. 6a. It explained that "[t]his careful mechanism for the time

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[1] Petitioners incorrectly assert (Pet. 16 n.3) that the Department of Justice did not appear in the court of appeals. In fact, the Department appeared through the General Counsel and an Associate General Counsel of the Board, who were appointed Special Attorneys to the United States Attorney for purposes of this case pursuant to 28 U.S.C. 515(b).

controlled disclosure of the recommendations would be unnecessary if they were generally available to the public at an earlier stage through the Sunshine Act." *Ibid.* The court accordingly concluded that Sections 2286d(a) and 2286d(g)(3) are Exemption 3 statutes "[b]ecause they require the withholding of the recommendations until after they have been received by the Secretary or the President." Pet. App. 6a.

The court rejected petitioners' reliance upon *United States Department of Justice* v. *Julian*, 486 U.S. 1, 8-11 (1988), which involved the parallel provision of Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3). Pet. App. 6a-8a. *Julian*, the court of appeals observed, concerned a criminal rule and statute that "require[d] sentencing courts and parole boards to provide defendants and inmates with their presentence reports no later than the times specified," but that "contain[ed] no language expressly denying defendants and inmates access to their reports at other times." Pet. App. 7a. The holding in *Julian* that the rule and statute were not Exemption 3 provisions did not apply here, the appeals court explained, because the Board's statute "requires that the information be made available to the public *after* a specific event, thereby precluding the *public* disclosure of recommendations dealing with highly sensitive matters before they reach the person or persons to whom they are directed." Pet. App. 8a.[2]

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[2] In addition, the appeals court noted, the disclosure authorized in *Julian* was to "the subjects of the presentence reports," and not to "the public at large." Pet. App. 8a.

b. Judge Williams dissented, Pet. App. 9a-14a, stating that he found "no evidence that Congress thought it was picking the delivery of recommendations to the Secretary as the *first* acceptable moment for disclosure." *Id.* at 12a.

5. Petitioners' petition for rehearing and suggestion of rehearing en banc were denied. Pet. App. 15a-18a. Judge Williams filed a statement concurring in the denial of rehearing en banc. *Id.* at 17a. He explained that although he believed the panel had erred, "it is hard to classify the dispute as one of 'exceptional importance' or where *en banc* treatment is truly 'necessary' to maintain uniformity of circuit law," since "the decision is evidently driven by some idiosyncratic feature of 42 U.S.C. § 2286d(a) (1988)." *Ibid.*[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision does not present an issue of broad significance, as it rests upon the language of a single agency's enabling statute. Accordingly, further review is not warranted.

1. Petitioners mischaracterize the court of appeals' decision when they assert (Pet. 10) that "[u]nder the decision below, * * * statutes that contain specific *disclosure* requirements that go beyond those of the open government laws * * * must now be

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[3] Judge Wald also filed a statement explaining that she did not call for en banc rehearing because it would have been "futile to do so." Pet. App. 18a.

read as sweeping Exemption 3 *prohibitions* on all other kinds of disclosure." The court of appeals made no such broad pronouncement, as Judge Williams recognized in declining to vote for en banc rehearing. See Pet. App. 17a. Instead, the court merely interpreted 42 U.S.C. 2286d(a) and 2286d(g)(3) to prohibit public disclosure of Board recommendations prior to their receipt by the Secretary of Energy or the President. That interpretation is correct and, in any event, does not affect the obligations of other agencies under the Sunshine Act.[4]

Congress enacted the Sunshine Act to provide the public with "the fullest practicable information regarding the decisionmaking processes of the Federal Government * * * while protecting the rights of individuals and the ability of the Government to carry out its responsibilities." Pub. L. No. 94-409, § 2, 90 Stat. 1241. In balancing those goals, the Sunshine Act makes the openness requirements subject to ten listed exemptions. 5 U.S.C. 552b(c)(1)-(10).

Exemption 3 of the Sunshine Act, which is identical to Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), provides that the Sunshine Act's open-meeting requirements do not apply to—

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[4] Thus, contrary to petitioners' assertion (Pet. 11-12), the decision below does not address whether the National Transportation Safety Board (NTSB) may rely upon Exemption 3 to close its meetings. The language of the NTSB's enabling statute differs significantly from that of the Board's enabling statute. See 49 U.S.C. App. 1906(a) (NTSB shall publish notice of its recommendations and make copies "available to the public at reasonable cost").

> any portion of an agency meeting * * * where the agency properly determines that such portion * * * is likely to—
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> * * * * *
>
> (3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. 552b(c)(3).

The court of appeals correctly concluded that the Board's enabling Act leaves it no discretion to disclose its recommendations prior to their receipt by the Secretary of Energy or the President. Pet. App. 5a-6a. Section 2286d(a) states that the recommendations shall be disclosed to the public "after receipt by the Secretary," 42 U.S.C. 2286d(a), or (in the case of recommendations relating to an "imminent or severe" public health and safety threat) "[a]fter receipt by the President." 42 U.S.C. 2286d(g)(3). As the court of appeals properly determined, the "natural" reading of those provisions "require[s] the withholding of the recommendations until after they have been received by the Secretary or the President." Pet. App. 6a.

That reading is reinforced when Section 2286d is considered as a whole. Section 2286d creates a "careful mechanism for the time-controlled disclosure" of the Board's recommendations and the Secretary's responses. Pet. App. 6a. Receipt of the Board's recommendations by the Secretary or the

President triggers the Board's duties to make them available in public reading rooms, publish them in the Federal Register, and solicit public comments on them. 42 U.S.C. 2286d(a). The date of receipt (or publication) also triggers the 45-day period for the Secretary's response. 42 U.S.C. 2286d(b)(1). Just as publication of the Board's recommendations is to follow "promptly" upon their transmittal to the Secretary, publication of the Secretary's response is to occur "[a]t the same time as" it is transmitted to the Board. 42 U.S.C. 2286d(b)(2). Similarly, the Secretary is required to publish her final decision on the Board's recommendations at the same time as she transmits it to the specified recipients in the Senate and House of Representatives. 42 U.S.C. 2286d(d). As the court of appeals recognized, in the context of these detailed provisions governing the timing and manner of transmittal, publication, and response to the Board's recommendations, "the most obvious reading" of Sections 2286d(a) and 2286d(g)(3) is that " 'after' means 'only after,' " Pet. App. 6a—*i.e.*, public disclosure of the Board's recommendations may occur only after they have been received by the Secretary of Energy or the President.

The court of appeals' conclusion that 42 U.S.C. 2286d(a) and (g)(3) fall within Exemption 3 is also consistent with the legislative history of the exemption. A committee report on the 1976 legislation enacting the Sunshine Act cited Section 801 of the Federal Aviation Act of 1958, 49 U.S.C. 1461 (1976), as an example of an Exemption 3 statute. H.R. Rep. No. 880, 94th Cong., 2d Sess. Pt. 1, at 9-10 (1976). Section 801 was similar to the provisions at issue here, insofar as it required the Civil Aeronautics

Board (CAB) to make public its decisions on certain applications by air carriers only after those decisions had been submitted to the President. See 49 U.S.C. 1461 (1976) ("[c]opies of all applications in respect to such certificates and permits shall be transmitted to the President by the [CAB] before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof"); see also *Aviation Consumer Action Project* v. *Civil Aeronautics Board*, 412 F. Supp. 1028, 1030 (D.D.C. 1976) ("clear and unambiguous" language of Section 801 prohibits publication of a Board decision prior to its submission to the President).

Petitioners nonetheless contend that the Board must open the meetings in which recommendations are discussed, thereby disclosing them to the public before they are transmitted to the Secretary or the President. Petitioners offer no reason, however, why Congress would require the Board to disclose its recommendations to the public before it disclosed them to the officers for whom the recommendations are formulated and who are required by statute to respond to them. That odd result would, as the court of appeals recognized (Pet. App. 6a), render unnecessary the provisions requiring disclosure of recommendations after their transmittal to the Secretary or the President. Petitioners' interpretation thus contravenes the principle that statutes should be interpreted to give effect to their every word. See, *e.g.*, *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

More importantly, petitioners' interpretation cannot be reconciled with the Secretary of Energy's

duty under Section 2286d(h) to prevent the release of classified and other controlled nuclear information. The Board itself is obligated to prevent the release of such information. 42 U.S.C. 2167(a)(3)(B), 2168(a). But the Board cannot always predict when classified or controlled information will be generated in the course of a meeting discussing recommendations for the Secretary or the President. When classified information is created, the Board cannot classify it on its own initiative, because the Board has no independent classification authority. Although DOE does have classification authority, DOE cannot realistically review and prevent release of information that is generated during the course of a public meeting. For these reasons, a critical security function is served by the provision in the Board's enabling Act requiring that it "promptly" publish its recommendations *after* they are received by the Secretary or the President. That provision enables the Secretary to review recommendations and transcripts of deliberations to determine whether they contain material that should be removed prior to publication. At the same time, the public's right to timely access to unclassified and unrestricted information is fully preserved.

Contrary to petitioners' suggestion (Pet. 15), nothing in the legislative history of the Board's enabling Act evinces an intent to require disclosure in derogation of the carefully crafted statutory scheme. Indeed, the legislative history confirms that Congress did not intend the Board's recommendations to be disclosed until after receipt by the Secretary or the President. The original Senate bill creating the Board required it to make unclassified versions of

its recommendations available to the public only "when possible." S. 1085, 100th Cong., 1st Sess. § 212(g)(6)(B) (1987), *reproduced in* S. Rep. No. 173, 100th Cong., 1st Sess. 41 (1987). A parallel bill in the House required the Secretary of Energy (as opposed to the Board) to make the recommendations public "as soon as practicable after receipt." H.R. 4264, 100th Cong., 1st Sess. (as passed on May 11, 1988); see 134 Cong. Rec. D568 (May 11, 1988) (daily digest). In conference, the responsibility for making the recommendations public was transferred from the Secretary to the Board, which was to act "promptly," rather than "as soon as practicable." H.R. Conf. Rep. No. 989, 100th Cong., 2d Sess. 170 (1988). Neither those changes nor anything else in the legislative history suggests that Congress altered its intention —evident in the bills considered in each House—to require disclosure of recommendations only after they are transmitted to the Secretary or the President.[5]

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[5] Because the court of appeals held that the Board's enabling Act falls within Exemption 3(A) of the Sunshine Act, the court had no occasion to pass on other arguments by the Board that furnished alternative grounds for rejecting petitioners' challenge to the Board's regulation implementing Exemption 3. Specifically, the Board argued that, in light of the detailed provisions governing publication of recommendations set out in the Board's enabling Act, those provisions displaced the Sunshine Act's requirements with respect to Board deliberations on recommendations. Gov't C.A Br. 14-25. In support of that argument, the Board cited, *inter alia*, *Ricchio* v. *Kline*, 773 F.2d 1389, 1395 (D.C. Cir. 1985), which held that the Presidential Recordings and Materials Preservation Act displaced the FOIA with respect to a request for disclosure of transcripts of White House conversations involving President

2. Petitioners contend (Pet. 12-15) that the court of appeals' decision conflicts with the decision of this Court in *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988). The court of appeals correctly recognized, however, that the situation before this Court in *Julian* is "readily distinguished" from the situation presented here. Pet. App. 7a.

In *Julian*, prison inmates sought disclosure of their presentence reports under the FOIA. At that time, Federal Rule of Criminal Procedure 32 required that a criminal defendant and counsel be furnished with the presentence report "[a]t a reasonable time before imposing sentence." See *Julian*, 486 U.S. at 4 (citing Fed. R. Crim. P. 32(c)(3)(A) and (E), 18 U.S.C. App. at 794 (1988)). In addition, the parole statute required that prisoners be provided with reasonable access to the presentence report "at least 30 days before a scheduled parole hearing." 486 U.S. at 6 (citing 18 U.S.C. 4208(b) (1982)). The Court in *Julian* held that neither Rule 32 nor 18 U.S.C. 4208(b) specifically exempted presentence reports from disclosure, so as to bring those provisions within Exemption 3 of the FOIA. 486 U.S. at 10-11.

The court of appeals correctly identified the critical distinction between the provisions at issue in

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Nixon. The Board also argued that its enabling Act falls within Exemption 3(B) of the Sunshine Act, because it "establishes particular criteria for withholding" and refers to "particular types of matters." 5 U.S.C. 552b(c)(3)(B); see Gov't C.A. Br. 33-39; see also *Lam Lek Chong* v. *United States*, 929 F.2d 729, 733 (D.C. Cir. 1991); *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 628-629 (D.C. Cir. 1978). Further review is particularly unwarranted in light of these alternative arguments supporting the court of appeals' decision.

Julian and those at issue here. Pet. App. 7a. The provisions in *Julian* required the disclosure of presentence reports by a specified time *before* the imposition of sentence or an inmate's parole hearing. Logically, a requirement that disclosure be made before a specified time can be satisfied by disclosure at the specified time, or at any earlier time. See Pet. App. 7a; see also Advisory Committee Notes on 1989 Amendment to Fed. R. Crim. P. 32, 18 U.S.C. App. at 1084 (Supp. III 1991) ("Nothing in the * * * rule prohibits a court from requiring disclosure at an earlier time before sentencing."). By contrast, the Board's enabling Act requires disclosure of its recommendations *after* receipt by the Secretary or the President. 42 U.S.C. 2286d(a) and (g)(3). That requirement cannot be satisfied by disclosing the recommendations *before* they have been received by the relevant officers. Pet. App. 8a. Put another way, *Julian* concluded that the statutory term "before" meant "no later than." That does not conflict with the conclusion below that the statutory term "after" means "no earlier than." Thus, the decision below does not conflict with *Julian*.

3. Petitioners assert that the decision below will prevent "public scrutiny of discussions and information going to the very heart of the Board's statutory mission." Pet. 16. That assertion is without merit. This case is about the timing of disclosure, not whether disclosure will occur. The Board remains obligated under its enabling Act to publish its recommendations and to request public comment on them. Moreover, the Board's regulations require it to record any Board meeting closed to the public, including meetings that discuss recommendations

that ultimately are not transmitted. 10 C.F.R. 1704.8. Transcripts of those meetings are made available to the public after they are screened for classified and other access-restricted information. 10 C.F.R. 1704.9, 1703.103(b)(5). The public's ability to scrutinize the Board's activities is thereby preserved within the bounds of the carefully crafted congressional mechanism for the "time-controlled disclosure of the recommendations." Pet. App. 6a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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